Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition for Forbearance Under 47 U.S.C. § 160(c) for Imposition of Additional Unbundling Obligations	WC Docket No. 05-170

REPLY OF VERIZON IN OPPOSITION TO PETITION FOR FORBEARANCE

Of Counsel:
Michael E. Glover

Scott H. Angstreich
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Edward Shakin
Sherry Ingram
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, VA 22201-2909
(703) 351-3099

Counsel for the Verizon telephone companies

October 12, 2005

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 1

II. THE COMMISSION SHOULD REJECT THE CLECS' PROPOSALS TO MODIFY THE COMMISSION'S NO IMPAIRMENT FINDINGS AND ITS EEL ELIGIBILITY CRITERIA 2

A. The Commission Should Reject the CLECs' Challenges to the Commission's Wire-Center No Impairment Findings for DS1 UNE Loops 2

B. The Commission Should Reject the CLECs' Challenges to the Cap on DS1 Dedicated Transport 6

C. The Commission Should Reject the CLECs' Proposal for Eliminating the EEL Eligibility Critiera 8

CONCLUSION 11

APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition for Forbearance Under 47 U.S.C. § 160(c) for Imposition of Additional Unbundling Obligations	WC Docket No. 05-170

REPLY OF VERIZON[1] IN OPPOSITION TO PETITION FOR FORBEARANCE

I. INTRODUCTION AND SUMMARY

As Verizon and others have shown, the CLEC Petitioners seek the imposition of new unbundling obligations, which cannot be obtained through a petition for forbearance. *See* Verizon at 2-6; BellSouth at 4-5; SBC at 6-8; Qwest at 3; USTelecom at 2-5. Instead, unbundling obligations can only be created pursuant to the standards set forth in § 251(c)(3) and § 251(d)(2), which permit the Commission to order unbundling only after it finds that carriers impairment exists and that unbundling is warranted in light of its costs. Of the commenters supporting the petition, only Eureka *et al.* (at 8) attempt to address this fundamental failing in the petition for forbearance. But their claim — that the Commission can require unbundling under § 160 without regard to § 251(d)(2), *USTA II*,[2] or the other court of appeals and Supreme Court decisions on the Commission's unbundling authority — must be rejected. Section 160 does not authorize the Commission to *create* any regulatory requirements *at all*, much less to create unbundling requirements that conflict with the specific unbundling provisions in the Act and binding judicial constructions of those provisions.

[1] The Verizon telephone companies ("Verizon") are identified in Appendix A to Verizon's opposition.

[2] *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

Instead, all the other commenters supporting the petition — no different from the petitioners themselves — argue that the Commission should reconsider decisions reached in the *Triennial Review Remand Order*.[3] But there is no reason to give these CLECs another chance to repeat these arguments. As we have explained, the CLEC Petitioners filed a nearly identical petition for reconsideration simultaneously with their petition for forbearance. In any event, even if the petition were construed as a request for reconsideration, the Commission should deny it. The commenters, no different from the CLEC Petitioners themselves, have provided no basis for the Commission to order additional unbundling by reversing decisions reached in the *TRRO*.

II. THE COMMISSION SHOULD REJECT THE CLECS' PROPOSALS TO MODIFY THE COMMISSION'S NO IMPAIRMENT FINDINGS AND ITS EEL ELIGIBILITY CRITERIA

A. The Commission Should Reject the CLECs' Challenges to the Commission's Wire-Center No Impairment Findings for DS1 UNE Loops

As we have explained, nothing in the petition undermined the Commission's finding that competition is possible without UNE DS1 loops throughout the limited set of "wire center[s] containing 60,000 or more business lines and four or more fiber-based collocators." *TRRO* ¶ 146. In addition, as the Commission found, "incumbent LEC [tariffed special access] offerings" remain available in those wire centers, and can be used "as a gap-filler" pending further deployment of competitive facilities. *Id.* ¶ 163.

Like the CLEC Petitioners, the commenters in support of the petition address none of this. And, continuing their pattern throughout this proceeding, they provide no evidence to support their impairment claims. The record, however, demonstrated that carriers are providing

[3] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005), *petitions for review pending, Covad Communications Co. v. FCC*, Nos. 05-1095 *et al.* (D.C. Cir.) ("*Triennial Review Remand Order*" or "*TRRO*").

high-capacity service in those wire centers and in the other areas where demand for DS1 and other high-capacity services is concentrated, using a combination of their own or other alternative facilities and special access services purchased from incumbent LECs, with extremely limited use of UNEs. The record also showed that carriers are providing high-capacity services to small and medium-size businesses such as antique dealers, book stores, dry cleaners, florists, gas stations, and hair dressers, to name a few. In addition, there is flourishing intermodal competition to provide high-capacity services to the very same predominantly residential and small office buildings addressed in the petition. *See* Verizon at 9-11.

Instead of addressing any of these points, the commenters, like the CLEC Petitioners, raise a variety of claims that the Commission has already rejected.

For example, CompTel (at 2-5). rehashes its opposition to the Commission's use of a wire-center-based impairment test for DS1 loops. As we have shown, a building-by-building analysis would have violated the D.C. Circuit's directive that "[a]ny process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment" occurs, *USTA II*, 359 F.3d at 574, in light of the CLECs' own evidence that they build their fiber rings "in a metropolitan area," and that they "design and build the ring such that it directly passes and can be used to serve as many of th[e] [commercial] buildings [in that area] as possible," *TRRO* ¶ 154.[4] Such a focus would also have violated the D.C. Circuit's decision that the Commission "cannot ignore" or "treat . . . as irrelevant"

[4] Contrary to CompTel's claims (at 3), the Commission did not reject the use of state commissions as fact finders in a building-by-building analysis because it believed such a delegation would violate *USTA II*. Instead, the Commission found that the identity of the fact-finder would not cure the fundamental problems with a building-by-building approach — including that building-specific data are difficult to obtain from the CLECs, not easily translated into impairment findings, and subject to significant dispute, "raising the prospect of expensive, fact-intensive litigation for years to come." *TRRO* ¶ 159.

"facilities deployment" to one location "when deciding whether CLECs are impaired with respect to" "similarly situated" locations. *USTA II*, 359 F.3d at 575 (emphasis omitted).

CompTel also asserts that the D.C. Circuit held that the Commission should require unbundling of loops wherever there is not already "multiple, competitive supply" of such loops. CompTel at 5 (quoting *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003)). But the D.C. Circuit held nothing of the sort. Instead, the D.C. Circuit stressed in *USTA I* that the question is whether a facility is "*unsuitable*" for multiple, competitive supply, not whether multiple suppliers have already deployed competing facilities. 290 F.3d at 427 (emphasis added). Indeed, consistent with the statute and the Supreme Court's construction, the D.C. Circuit has repeatedly held that the critical inquiry is whether CLECs are *capable* of competing without UNEs — that is, whether "competition is possible" without UNEs in a particular area. *USTA II*, 359 F.3d at 575; *see also* 47 U.S.C. § 251(d)(2); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 & n.11 (1999). The Commission, therefore, correctly recognized that the 1996 Act requires that it evaluate impairment based on the "ability" of carriers to compete without UNEs. *See, e.g.*, *TRRO* ¶ 28.[5]

[5] CompTel (at 4-5) also claims that the Commission did not consider building access issues. But the Commission explained that it would "leave building-specific impediments to be addressed in other Commission proceedings, or in other fora, as appropriate," and would not "distort [its] unbundling analysis in an effort to solve alleged deficiencies in other aspects of [its] regulatory regime." *TRRO* ¶ 163. Indeed, to the extent such claims regarding building access have merit — and CLECs' success in deploying fiber loops to buildings suggests that such issues can be overcome, *see, e.g.*, Reply Comments of Verizon, WC Docket No. 04-313 & CC Docket No. 01-338, at 73-74 & n.100 (FCC filed Oct. 19, 2004) — the only lawful course is for the Commission to address those issues directly, rather than indirectly by mandating unbundling. *See USTA II*, 359 F.3d at 571 (holding that it would be "irrational" to mandate unbundling when a "narrower alternative," with "fewer disadvantages," could address specific allegations of impairment).

Eureka *et al.* and Covad assert that CLECs will "never" build loops to predominantly residential or small office buildings, even in the few wire centers that satisfy the Commission's no impairment test for DS1 loops. Eureka *et al.* at 6; *see* Covad at 2-3. But as the Commission correctly recognized, the question is not whether carriers will build "*stand-alone* DS1-capacity loops." *TRRO* ¶ 171 (emphasis added). Instead, the question is whether competition is possible without UNEs, including through the use of DS1 channels on higher-capacity, competitively deployed facilities. *See id.* And the record showed that such competition is possible, both in the few wire centers that meet the Commission's DS1 loop test, and in other areas where demand for DS1 service exists and carriers are currently meeting that demand using a combination of their own facilities and third-party facilities, including incumbents' special access. These carriers also, as the Commission recognized, have the option using special access to fill in gaps in their networks while they are deploying additional facilities. *See id.* ¶ 163.

Eureka *et al.* and Covad also claim that reconsideration is warranted in light of the pending combinations of SBC/AT&T and Verizon/MCI. As an initial matter, consistent with the Commission's determination that changed circumstances should not lead to a finding of impairment in areas where the Commission found no impairment at the time of the *TRRO*,[6] those pending transactions do nothing to affect the Commission's determinations of where competition is *possible* without UNEs. Indeed, the fact that AT&T and MCI had been able to compete in those areas before these transactions demonstrates that competition is possible in those areas, irrespective of whether AT&T and MCI had remained independent entities. In addition, these commenters' specific claims lack merit. Eureka *et al.* (at 7-8) point to the synergies expected to be realized through the mergers, and claim that SBC/AT&T and Verizon/MCI will use the

[6] *See* 47 C.F.R. § 51.319(a)(4)(i), (a)(5)(i), (e)(3)(i)-(ii).

savings somehow to augment their competitive position with respect to customers in predominantly residential and small office buildings. Even aside from the fact that this claim is not actually about the mergers — it could be made about *any* cost savings realized by *any* company — the synergies do not change either the characteristics of the few wire centers where the Commission found that competition is possible without UNEs or the availability of special access as a "gap-filler" in those wire centers. *TRRO* ¶ 163.[7]

B. The Commission Should Reject the CLECs' Challenges to the Cap on DS1 Dedicated Transport

In the *TRRO*, the Commission found that CLECs are impaired without UNE access to DS1 dedicated transport on all routes except those between two Tier 1 wire centers. The Commission, however, capped the number of DS1 UNE transport circuits that a CLEC could obtain on a particular route at 10. *See TRRO* ¶ 128; 47 C.F.R. § 51.319(e)(2)(ii)(B). As the Commission explained, based on the efficiencies of aggregating traffic, when a CLEC requires more than 10 DS1 transport circuits, a reasonably efficient CLEC would utilize a DS3, so there is no basis for a continuing DS1 unbundling obligation. *See TRRO* ¶ 128.

Like the CLEC Petitioners, CompTel, Eureka *et al.*, and Covad all claim that the cap on UNE DS1 transport has the effect of preventing CLECs from using UNE DS1 loops as part of

[7] Like the CLEC Petitioners, Covad (at 3-4) asserts that the Commission relied upon the availability of wholesale capacity from AT&T and MCI specifically in formulating its DS1 loop impairment test in the *TRRO*. In fact, the record showed that dozens of carriers — not merely AT&T and MCI — advertise the availability of DS1 loops at wholesale. *See* Verizon at 13-14. In any event, Covad cites only two paragraphs from the *Triennial Review Order* — not the *TRRO* — in support of its claim. Those paragraphs, in any event, do not discuss AT&T's or MCI's wholesale offerings and, instead, note evidence of AT&T's wholesale purchases from other carriers. *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶¶ 321 & n.950, 324 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

EELs in those wire centers where UNE DS1 loops remain available. *See* CompTel at 5-8; Eureka *et al.* at 9-11; Covad at 4-5. And, like the CLEC Petitioners, these commenters also ignore their ability to combine DS1 UNE loops with DS3 transport, whether obtained as a UNE or otherwise. This is what "reasonably efficient" telephone companies do, *TRRO* ¶ 24, as the CLEC Petitioners themselves forthrightly acknowledged, *see* Petition at 21 (acknowledging that it is "inefficient" not to multiplex traffic onto DS3 or higher-capacity transport). A CLECs' decision to maintain an inefficient arrangement of multiple DS1s that would normally be efficiently consolidated into one or more DS3 through multiplexing, moreover, foists costs onto incumbents, as they must maintain those many individual DS1 circuits on a transport route.[8]

Covad (at 4) and CityNet (at 1) claim that the Commission should eliminate the DS1 transport cap in the context of DS1/DS1 EELs on the ground that "EEL impairment" exists for such circuits. These commenters ignore that the Commission expressly rejected proposals "to analyze interoffice transport separately when it is used as a component of an EEL combination," concluding that CLECs had made "no compelling case why an impairment analysis of the individual element components of an EEL combination is insufficient." *TRRO* ¶ 85. Indeed, as the Commission noted, its conclusion that there is "no benefit in performing a duplicative analysis of the same elements" depending on whether they are used as part of an EEL was consistent with its decision in the *TRO* to reject claims that "EELs [are] a separate network element." *Id.* Covad and CityNet offer no basis for the Commission to reconsider these conclusions.

[8] Because CLECs do not bear the full costs of the inefficient arrangement, there is no merit to Eureka *et al.*'s assertion (at 9) that CLECs would not continue ordering DS1 transport circuits beyond the cap the Commission established where it was inefficient to do so.

Finally, CityNet takes issue with the Commission's decision to set the cap at 10 DS1 transport circuits, disputing the Commission's analysis of the point at which it is efficient to replace multiple DS1 circuits with a DS3 circuit. *See* CityNet at 1 & Attach. In support of the cap, the Commission relied on comments from three different CLECs, which operated in a variety of states and argued that the "cut over" point at which it becomes efficient to use a DS3 is between 8 and 10 DS1 transport circuits. *TRRO* ¶ 128 n.358. CityNet does not address any of this, which provided more than ample support for the Commission's determination of the cut over point. Instead, CityNet claims only that its own cut over point is different. *See* City Net Attach. CityNet, however, does not provide any detail in support of the prices that it cites, making it impossible to address the specifics of its claims. In any event, as the Commission has recognized, impairment is not assessed in light of the specific circumstances of any individual carrier, but instead is based on whether a reasonably efficient carrier can compete without UNEs. *See TRRO* ¶ 26.

C. The Commission Should Reject the CLECs' Proposal for Eliminating the EEL Eligibility Critiera

The current EEL eligibility criteria are supposed to prevent CLECs from obtaining EELs as UNEs to provide a service — long-distance — as to which they are not impaired. *See* Verizon at 16-17. As Verizon has demonstrated elsewhere, the current rules do not go nearly far enough to ensure that CLECs do not obtain UNEs to provide long-distance services. Therefore, the elimination of those criteria — as proposed by the CLEC Petitioners and some of the supporting commenters — should be rejected.

Although the CLEC Petitioners themselves were silent on how incumbents or the Commission are to monitor compliance with the Commission's substantive rules regarding EELs in the absence of any eligibility criteria, two commenters suggest that § 208 complaints are an

appropriate mechanism to ensure compliance. *See* CompTel at 8; Eureka *et al.* at 14. Given CLECs' prior claims that the record-keeping and audit requirements included in the Commission's eligibility criteria are too burdensome, it is ironic — to say the least — that CLECs would suggest recourse to the far more resource-intensive § 208 process as an alternative. In any event, after-the-fact § 208 complaint proceedings are hardly an efficient substitute for even the current set of up-front criteria, despite their shortcomings. Those criteria, along with the record-keeping and audit requirements, provide both an initial check on CLECs' requests for EELs and a means of efficiently resolving disputes about those requests, including through recourse to proceedings before state commissions.

Eureka *et al.* (at 13-14) claim that the Commission should eliminate the EEL eligibility criteria on the ground that the Commission's conclusion that CLECs cannot use UNEs exclusively for long-distance service "is very likely unlawful." But the D.C. Circuit expressly noted in *USTA II* that the "CLECs have pointed to *no evidence* suggesting that they are impaired with respect to the provision of long distance services." 359 F.3d at 592 (emphasis added). No such evidence was put on the record following *USTA II*. Accordingly, the D.C. Circuit's conclusion, in this very context, that carriers "cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion" that carriers are impaired without UNEs compelled the Commission's refusal to order unbundling with respect to long-distance services. *Id.* Tellingly, the CLECs have not challenged the Commission's conclusion in this regard in their petitions for review of the *TRRO*.

Finally, Eureka *et al.* and Covad complain that the current EEL eligibility criteria limit the use of EELs to provide IP-enabled services, such as VoIP. *See* Eureka *et al.* at 12-13; Covad

at 5. But neither identifies a single aspect of the current criteria that has this effect. Indeed, to the extent that VoIP is used to provide service between local exchange areas, it is no different from any other long-distance service. Nor do they point to a single instance in which a CLEC sought access to an EEL to provide a mix of local and long-distance service using VoIP, but was unable to satisfy the eligibility criteria. In any event, as we have explained (at 17 n.24), claims such as these could, at most, support the *modification* of the EEL eligibility criteria, not their elimination. And, in the event the Commission were to re-open the issue of the criteria it should adopt to ensure compliance with its conclusions that UNEs cannot be used exclusively for long-distance or wireless service, it should also consider ways to strengthen the criteria, so that they better ensure compliance with the Commission's no impairment determinations.[9]

[9] Repeating arguments made in support of properly captioned petitions for reconsideration of the *TRRO*, PaCLEC (at 2) and Eureka *et al.* (at 11 n.20) argue that the Commission should permit CLECs to obtain EELs for so-called local data services. As we explained in responding to these claims, this proposal would enable CLECs to use EELs virtually exclusively for long-distance voice and data as long as they provide a peppercorn of "local" data service — a term the CLECs tellingly leave undefined. Such a modification would do nothing to promote competition in local telephony and would undermine the deployment of advanced services because, as the Commission has repeatedly recognized, the imposition of unbundling requirements decreases the incentives of competitors and incumbents alike to invest in broadband facilities. *See, e.g.*, *TRO* ¶ 213; Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496 (2004), *petitions for review pending, AT&T Corp., et al. v. FCC, et al.*, Nos. 05-1028, *et al*. (D.C. Cir.).

CONCLUSION

For the foregoing reasons, and those set forth in Verizon's Opposition, the Commissions should deny the CLECs' petition.

Respectfully submitted,

_____

Scott H. Angstreich
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Edward Shakin
Sherry Ingram
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, VA 22201-2909
(703) 351-3099

Counsel for the Verizon telephone companies

Of Counsel:
Michael E. Glover

October 12, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on the 12th day of October 2005, I caused a copy of the foregoing Reply of Verizon in Opposition to Petition for Forbearance to be served upon each of the parties on the service list below by first-class mail, postage prepaid.

Brad E. Mutschelknaus
Steven A. Augustino
Scott A. Kassman
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

_____
Tiffany Thompson